NO. 20588

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MERRILL MACK MOSER and
JACKSON FEE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
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IN THE UNITED STATES COURT OF APPEALS

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellants, Jackson Fee (sometimes hereinafter referred to as "Fee") and Merrill Mack Moser (sometimes hereinafter referred to as "Moser") were indicted by the Federal Grand Jury for the Southern District of California on July 24, 1963 [C. T. 2]. 1/ The indictment contained one count alleging that on June 17, 1963, Fee and Moser by force and violence and by intimidation took $3,273 from a teller of the Citizens National Bank, Los Angeles, California, a national bank whose deposits

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1/ "C. T." refers to Clerk's Transcript.

were insured by the Federal Deposits Insurance Corporation [C. T. 2].

Appellants were arraigned in Los Angeles on April 26, 1965 [C. T. 41]. Subsequently, on May 24, 1965, the Honorable Jesse W. Curtis, United States District Judge, denied appellants' motion to dismiss the indictment because of an alleged deprivation of their right to a speedy trial as guaranteed by the Sixth Amendment of the United States Constitution. Appellants then entered pleas of not guilty to the charge stated in the indictment [C. T. 42].

Appellants' trial commenced on June 1, 1965, before the Honorable Charles H. Carr, United States District Judge [C. T. 43]. On June 3, 1965, the jury returned a verdict of guilty as to each appellant [C. T. 45]. Appellants were each sentenced to 25 years imprisonment on June 3, 1965 [C. T. 45].

On July 11, 1965, a notice of appeal was filed pursuant to Rule 37(a)(1), F. R. C. P. [C. T. 48].

The jurisdiction of the District Court was based upon Section 2113(a)(d) of Title 18, United States Code. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

SPECIFICATIONS OF ERRORS

A. Were appellants denied their right to a speedy trial as guaranteed by the Sixth Amendment of the Constitution of the United States?

B. Were appellants denied their right to counsel, as guaranteed by the Sixth Amendment of the Constitution of the United States?

C. Did the trial court commit error in finding appellants' confessions to be voluntary and admitting them into evidence at the trial?

III

STATEMENT OF FACTS

On July 24, 1963, the Grand Jury for the Southern District of California returned a one-count indictment charging Moser and Fee with having robbed the Citizens National Bank, 5400 South Western Avenue, Los Angeles, California, on June 17, 1963. The indictment further alleged that the defendants used a shotgun during the commission of the aforesaid robbery, thus placing in jeopardy the life of one Marcella Coughlin, a teller at Crocker Citizens Bank [C. T. 2-3].

At approximately 1:10 P. M. on July 12, 1963, Moser and Fee were taken into custody by the Federal Bureau of Investigation near Greenback, Tennessee for robbing the Merchants and Farmers Bank at Greenback, Tennessee on or about 12:00 P. M. on July 12, 1963 [R. T. 203-209]. 2/ At this time both Moser and Fee were advised of their right to counsel, the right to remain silent and that any statement that they did make could be used against

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2/ "R. T." refers to Reporter's Transcript.

them in a court of law [R. T. 207].

At approximately 3:10 P. M., July 12, 1963, Moser and Fee were taken to Knoxville, Tennessee and were taken before a United States Commissioner, who informed them that they were charged with the Greenback, Tennessee bank robbery and also advised of their right to remain silent and their right to counsel [R. T. 209-210].

Initially, the interrogation of Moser and Fee was limited to the Greenback robbery [R. T. 195]. At approximately 8:45 P. M. Fee and Moser were first interrogated about the Los Angeles robbery which is the subject of this appeal [R. T. 195]. At this time Moser and Fee were again advised of their right to counsel, their right to remain silent, and that anything they said could be used against them in a court of law [R. T. 145, 220].

On or about 10:30 P. M. on July 12, 1963, after conferring between themselves [R. T. 218], appellants admitted robbing the Los Angeles bank on June 17, 1963 and shortly thereafter signed detailed statements describing this robbery [R. T. 159, 184; Plaintiffs' Exhibits 9 and 10].

On September 20, 1963, appellants appeared in Criminal Action No. 16977 in the United States District Court for the Eastern District of Tennessee, Northern Division, waived indictment and were arraigned and pleaded guilty to the Greenback, Tennessee robbery [C. T. 6]. Thereafter, on October 22, 1963, appellants were sentenced to prison for a term of 24 years [C. T. 6-9], pursuant to Title 18, United States Code, Section 4208(a)(2)

[C. T. 18].

The appellants were thereafter incarcerated in the Federal prisons in Atlanta, Georgia and Leavenworth, Kansas. Appellants remained incarcerated in their respective Federal penitentiary at all times from October 22, 1963 until early April 1965, except when appellant Moser returned to Knox County Jail, Knoxville, Tennessee in February, 1965 for a hearing on his petition filed in the United States District Court, Eastern District of Tennessee, Northern Division, pursuant to Title 18, United States Code, Section 2255. Appellant Moser was returned to the Federal Penitentiary in Atlanta, Georgia on March 5, 1965 [C. T. 6-11].

In the statements signed by appellants they admitted robbing the bank in Los Angeles. Both appellants stated that a third man had been hired to drive the get-away car from the robbery [R. T. 390-393 and Plaintiffs' Exhibits 9 and 10]. During the incarceration of appellants they were interrogated several times by the Federal Bureau of Investigation concerning the identity of this third person who was involved in the robbery [C. T. 7, 8, 10].

On January 7, 1964, appellant Fee wrote a letter to the United States Attorney in Los Angeles inquiring into the disposition of this case. The United States Attorney immediately replied and informed appellant Fee that there had been no disposition of this case as of that date [C. T. 9]. On or about March 20, 1965, appellants wrote to the United States Attorney and requested that an early disposition be made of the indictment returned on July 24, 1963 [C. T. 7]. This was the first demand for trial received from

either appellant. On April 18 and 24, 1965, appellants were transferred to Los Angeles and they were arraigned on April 26, 1965 [C.T. 6, 9]. A motion was heard to dismiss the indictment on May 24, 1965 and this motion was denied by the Honorable Jesse W. Curtis, United States District Judge [C.T. 42].

Appellants' trial commenced on June 1, 1965 and the Government presented three witnesses who identified Fee and Moser as the men who robbed the bank on June 17, 1963 [R.T. 58-60, 80-82 and 33]. In addition, the Government called another witness who identified Fee as the man holding the sawed-off shot gun and also recorded the license number of the get-away car [R.T. 95-96, and 101-102]. The Government introduced into evidence the signed statements of Fee and Moser, wherein each admitted the commission of the crime and these admissions stated that a third party had participated in this crime [R.T. 305, 353].

Appellants testified both outside of the hearing of the Jury [R.T. 221, 246] and before the Jury [R.T. 294, 316], denying their guilt and contended that their signed admissions were not voluntary. The Honorable Charles H. Carr, United States District Judge, made the expressed finding that the signed admissions were voluntary [R.T. 259] and that he did not believe the testimony of either appellant concerning whether their rights had been violated [R.T. 254].

On June 3, 1965, the Jury found appellants guilty as charged in the indictment. Appellants were each sentenced to 25 years in prison for the crime of bank robbery [C.T. 46, 47].

IV

ARGUMENT

A. IN LIGHT OF ALL THE CIRCUMSTANCES, APPELLANTS' RIGHT TO A SPEEDY TRIAL HAS NOT BEEN VIOLATED.

The passage of time is one factor to consider in determining whether a defendant has been denied his right to a speedy trial. The lapse of 22 months from indictment to trial, standing alone, does not constitute a violation of appellants' right to a speedy trial. See: United States v. Ewell, 383 U.S. 116 (1965) and Fouts v. United States, 253 F.2d 215 (6th Cir. 1958). As the Supreme Court of the United States stated: "The right to a speedy trial is necessarily relative. It is consistent with delays, it depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." Beavers v. Haubert, 198 U.S. 77, 87 (1905). The delay and its effect must be tested by the circumstances attendant to the specific case. Pollard v. United States, 352 U.S. 354, 361 (1957).

Appellants contend that there has been a 22 months delay between the return of the indictment on July 24, 1963, and the commencement of the trial on June 1, 1965. Part of this period is totally beyond the control of the Government as shown by the fact that from July 12, 1963 to October 22, 1963, appellants were in the custody of the United States District Court for the Eastern District of Tennessee and in the process of pleading guilty and being sentenced for robbing a bank in Greenback, Tennessee on July 12,

1963 [C. T. 7, 9].

During the month of March, 1965, appellant Moser sent a letter to the United States Attorney for the Southern District of California requesting that they be tried for the Los Angeles bank robbery or that the indictment be dismissed [C. T. 7]. Upon receipt of appellant Moser's request for a trial, the Government immediately had the prisoners transferred to Los Angeles in mid-April, 1965, and arraigned on April 26, 1965, and the trial commenced on June 1, 1965. Therefore, the delay from which appellants complain consists of approximately 16 months from October 22, 1963 to March, 1965 when the first request for trial was submitted and immediately acted upon.

1. ADEQUATE REASONS EXIST FOR THE 16 MONTHS DELAY IN BRINGING APPELLANTS TO TRIAL.

On July 12, 1963, appellants signed statements admitting their commission of the Los Angeles robbery. In these statements the appellants stated that a third man drove the car in the robbery and was paid for his service [R. T. 390-393]. Due to the implication of a third participant in the robbery the Federal Bureau of Investigation launched an extensive investigation to determine the identity of the third subject. This investigation has included a multitude of interviews with numerous suspects, a review of prison records at Folsom, Vacaville, and San Quentin and numerous interviews with inmates of those institutions who were associated with

appellants. Appellants have subsequently denied that a third man participated in the robbery [C. T. 20].

In Harlow v. United States, 301 F. 2d 361 (5th Cir. 1962), the court held that a post indictment investigation, lasting two years for the purpose of obtaining additional evidence for trial was neither unreasonable nor unnecessary. In addition, the court stated that the fact that no evidence resulted from this investigation has no bearing on the question of whether it was reasonable and necessary. The court noted that the Government immediately proceeded to bring the case to trial once they were certain that the additional evidence was not available. In the present case, the investigation for additional evidence concerning the Los Angeles robbery lasted less than two years and was diligently pursued once the information concerning the implication of a third man was made known by appellants. The propriety of the continued investigation in the Harlow case, ibid, is equally applicable in the present case because the Government was compelled to investigate all facts concerning the case in order to be properly prepared for trial. It is irrelevant that no additional evidence was obtained and that appellants were convicted on the evidence available prior to the investigation.

The Government recognizes that the right to delay a trial for continued investigation subsequent to indictment must be limited and will be proscribed if the investigation is for an inordinately lengthy period of time while the defendant is in custody under the indictment that is being investigated. See the Petition of

Provoo, 17 F.R.D. 183 (D.C. Md. 1955). In considering whether the Government's continued investigation was reasonable, the fact that the appellants were not in custody for the indictment should be considered. While it is true that a defendant's right to a speedy trial is not to be impaired because of his incarceration on a separate and distinct charge, see Ponzi v. Fessenden, 258 U.S. 254 (1927), it is submitted that the fact that a defendant is incarcerated for a different and unrelated crime should not be a reason to compel the Government to bring the case to trial any sooner than if the defendant were free from custody. In Harlow v. United States, supra, the defendant was not in custody and the court held that an investigation of two years subsequent to the indictment was reasonable and necessary and did not violate the defendant's right to a speedy trial.

The rights of a defendant to a speedy trial constitutes a balancing of the individual rights involved with the needs of public justice. See Pollard v. United States, supra. It is submitted that economy of judicial administration is a valid consideration of public justice. In the present case the facts required that the appellants be tried jointly because they acted together in robbing the bank, the arresting officers must be brought to Los Angeles from Tennessee, and it would therefore be unduly expensive and difficult to effectively try each appellant separately. In this respect, it should be considered that appellant Moser was involved in distinct legal proceedings before the United States District for the Eastern District of Tennessee from September 1, 1964 to

March 5, 1965 [C. T. 20-21], and was not available for trial during that time.

2. IN BALANCING THE RIGHTS OF THE INDIVIDUAL WITH THE NEEDS OF PUBLIC JUSTICE, THE LACK OF PREJUDICE TO THE DEFENDANT FROM THE DELAY IS A RELEVANT CONSIDERATION.

Apparently, appellants' only contention of prejudice is that they were interrogated several times during their incarceration concerning the Los Angeles robbery [C. T. 7-10]. It is conceded that some interrogation did occur during their incarceration but contrary to the statements made in appellants' brief (Appellants' Opening Brief, page 17), there was no attempt to obtain a confession of the crime because appellants had previously signed statements admitting all of the facts of the crime except for the identity of the third party. In fact, no information obtained from any post-indictment interrogation was used in this trial. It is proper for the Government to conduct interrogation of defendants after indictment and in fact the Supreme Court in Massiah v. United States, 377 U.S. 201, 207, recognized the propriety of a continuing investigation of a defendant after indictment.

The overwhelming majority of cases which have considered whether a defendant has been deprived of his right to a speedy trial

consider the prejudice defendant has suffered by the delay. 3/ As the Court stated in United States v. Holmes, 168 F. 2d 888 (2nd Cir. 1947), at 891:

> "In the complete absence of any indication that the instant defendant was adversely effected in the preparation or prosecution of his defense by the lapse of time in bringing the case to trial . . . defendant had no complaint without a demand."

Appellants have not made any showing of fact or allegation which indicates that they have been prejudiced by the delay in their defense of this case. The statements admitting this robbery were signed by appellants more than one week prior to the return of the indictment. The other evidence in the case primarily consisted of the eye witnesses who identified the appellants, tracing of the license number of the get-away car and identifying that the car was owned by appellant Moser. There was no evidence in the trial which was in any way altered or affected by the delay.

3/ See United States v. Ewell, 383 U.S. 116, 122 (1965); Yeaman v. United States, 326 F. 2d 293, 294 (9th Cir. 1963); United States v. Simmon, 338 F. 2d 804, 807 (2nd Cir. 1964); Taylor v. United States, 238 F. 2d 259, 262 (D. C. Cir. 1956); and Petition of Provoo, 17 F. R. D. 183, 203 (D. C. Md. 1955).

3. THE QUESTION OF WHETHER A DEFENDANT HAS BEEN DEPRIVED OF HIS RIGHT TO A SPEEDY TRIAL IS TO BE DETERMINED IN THE SOUND DISCRETION OF THE TRIAL COURT AND IN THE PRESENT CASE THERE IS NO SHOWING OF AN ABUSE OF THIS DISCRETION.

Rule 48(b) of the Federal Rules of Criminal Procedure provides for the dismissal of an indictment for unnecessary delay in bringing a defendant to trial. This Rule 48(b) is an implementation of the right to a speedy trial guaranteed by the Sixth Amendment of the Constitution of the United States. United States v. Ward, 240 F. Supp. 659 (D. C. Wis. 1965).

A motion to dismiss for lack of prosecution is addressed to the sound judicial discretion of the trial judge. United States v. McWilliams, 163 F. 2d 695 (D. C. Cir. 1947).

On review of a ruling to dismiss for lack of prosecution, the Court of Appeals is not to be concerned with the question of whether it would reach the same result, but whether there exists an abuse of discretion. United States v. Hester, 325 F. 2d 654 (9th Cir. 1963).

On May 24, 1965, the Honorable Jesse W. Curtis, United States District Judge, heard appellants' motion to dismiss and based upon the record and oral arguments denied appellants' motion [C. T. 42]. While the trial judge did not write an opinion setting forth his reasons for denying the motion, it is respectfully submitted that there exist numerous reasons justifying the trial

court's decision. In addition, appellants have failed to show this Honorable Court any facts which establish an abuse of discretion. It is therefore respectfully submitted that for this reason alone, appellants' contention that they have been deprived of their constitutional rights to a speedy trial be denied.

4. APPELLANTS RECEIVED A TRIAL IMMEDIATELY AFTER THEIR REQUEST FOR A SPEEDY TRIAL.

There are a line of cases holding that even if the delay is deemed unnecessary and unreasonable that a person's right to a speedy trial is a personal right that the defendant must assert before he can be considered to have been deprived of his right to a speedy trial. See Danziger v. United States, 161 F. 2d 299 (9th Cir. 1947); Collins v. United States, 157 F. 2d 409 (9th Cir. 1946).

In early 1964 appellant Fee made an inquiry of the United States Attorney's Office, Southern District of California, concerning the existing indictment for the Los Angeles robbery [C. T. 9]. The Government responded that no decision had been made concerning the disposition of this case [C. T. 9]. During March 1965 appellant Moser wrote to the United States Attorney for the Southern District of California and requested disposition of this case [C. T. 7]. This letter was the first demand by either appellant that they be tried on the charges.

Immediately upon receipt of the letter requesting a speedy

disposition of this case, the Government had appellants transferred to Los Angeles, California, and arraigned before the United States Court [C. T. 6, 9]. On May 17, 1965, appellants filed a motion to dismiss the indictment for the alleged deprivation of their right to a speedy trial [C. T. 4]. On May 27, 1965, appellants' motion was heard and denied [C. T. 42]. The trial of this case commenced on June 1, 1965 and appellants were convicted and sentenced on June 3, 1965 [C. T. 43-47]. Thus, a period of less than 90 days elapsed from the time the appellants requested a trial and their ultimate conviction and sentencing. Considering the distance travelled, the pretrial motions filed, and allowing time for preparation of their defense, this 90 days delay between the demand for the trial and completion thereof does not constitute an unreasonable delay in bringing appellants to trial.

B. THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE CONFESSIONS OF APPELLANTS OF THE LOS ANGELES BANK ROBBERY.

Appellants contend that the undisputed facts in the record plainly show that the confessions were involuntary. The facts relied upon by appellants are:

1. That the interrogation for both crimes lasted from approximately 4:30 P. M. to 10:40 P. M.;

2. That by confessing to the prior bank robbery, the appellants were placed in a disadvantageous position for the

interrogation on the Los Angeles Bank robbery;

3. That the Federal Bureau of Investigation Agent answering appellant Moser's question on Rule 20 created the possibility of concurrent sentences in the minds of appellants and this possibility of leniency triggered their confessions; and

4. No attorney was present during the interrogation.

In addition, appellants contend that the failure of the Federal Bureau of Investigation to follow the interrogation guidelines set forth in Miranda v. Arizona, 384 U.S. 436 (1966), taken into consideration with the previously mentioned facts indicating involuntariness, leads " . . . plainly to the conclusion that the confessions were involuntary" [Appellants' Opening Brief, page 23].

1. "APPELLANTS WERE NOT DEPRIVED OF THEIR RIGHTS TO COUNSEL AND WERE FULLY ADVISED OF THEIR CONSTITUTIONAL RIGHTS TO COUNSEL AND TO REMAIN SILENT."

Trial in this case commenced on June 1, 1965, and as the court held in Johnson v. New Jersey, 384 U.S. 719, 734 (1966), the requirements of Miranda v. Arizona, supra, are not controlling in determining the inadmissibility of the confession. The admissibility of appellants' confessions is dependent upon whether it was voluntary (which is discussed IV, B, 2, infra), and if the ruling set forth in Escobedo v. Illinois, 378 U.S. 454 (1964) has been violated. In Escobedo, supra, the Court held that when a suspect has requested and been denied an opportunity to consult with a

lawyer and when the police had not effectively warned him of his absolute right to remain silent, any statement he makes under those circumstances will be inadmissible. Id. at 490-491. Appellants now contend that they requested counsel during the interrogation and their request was denied [R. T. 231]. However, the testimony of the interrogating agents refutes the allegation that counsel was demanded and denied [R. T. 157, 161, 178].

After hearing the evidence, the trial judge found that he disbelieved appellants' testimony concerning the facts of the interrogation and based this disbelief upon their demeanor on the stand, their actions and that everything about them indicated to the trial judge that they were fabricating their story [R. T. 255]. The record in this case is replete with evidence that the appellants received a number of warnings as to their right to counsel and their right to remain silent [R. T. 145, 207, 209-210, and 220].

If a defendant knowingly is aware of his right to remain silent and to have counsel and does not request such counsel he has waived such assistance. See United States v. Childress, 347 F. 2d 448, 450 (7th Cir. 1965); Hayes v. United States, 347 F. 2d 668 (8th Cir. 1965). The failure of appellants to demand counsel constitutes a basis upon which the interrogator can continue questioning without the presence of counsel and there has been no violation of appellants' right to counsel, or of the holding set forth in Escobedo v. Illinois, supra.

2. APPELLANTS' CONFESSIONS WERE VOLUNTARY AND THEIR ADMISSION INTO EVIDENCE DOES NOT CONSTITUTE A VIOLATION OF DUE PROCESS AS GUARANTEED BY THE FIFTH AMENDMENT.

Appellants contend that their confessions were involuntary as a matter of law because they were interrogated from 4:30 to approximately 10:40. However, the record shows that the interrogation concerning the Los Angeles robbery commenced at approximately 8:40 P. M. and appellants confessed at approximately 10:40 P. M. [R. T. 156, 159, and 183-184]. The record in this case is void of any indication that appellants were ill-treated during this two hour interrogation concerning the Los Angeles robbery, or at any other time. While appellants did not accept food, the record shows that food and restroom facilities were made available to appellants [R. T. 179, 213] and cigarettes were given to them [R. T. 332].

Appellants contend that because they had confessed to robbing the Greenback Bank prior to being interrogated on the Los Angeles Bank, that this prior confession placed them in such a disadvantageous position to the interrogators that their confessions could not be the result of a free will. It must be noted that appellants confessed to the Greenback robbery within one hour of their arrest. They confessed when they were taken to the bank, even before being taken to Knoxville [R. T. 210].

In a companion case decided in Miranda v. Arizona,

Westover v. United States, 384 U.S. 494 (1966), the Court refused to assume an intelligent waiver of constitutional rights when one had been in custody for over fourteen hours and had been interrogated at length during that period. The defendant Westover had not been advised of any of his constitutional rights during the prior interrogation by the Kansas City Police. This case supports the proposition that it is valid to continue to interrogate the defendant on other crimes, but that the overall length and nature of the interrogation must be considered. In the case now before the Court, the appellants were fully warned and advised of their rights prior to any interrogation concerning the Greenback Bank robbery and they readily confessed after a short period of interrogation. Interrogation commenced concerning the Los Angeles robbery at approximately 8:40 P. M. and appellants were again advised of their rights. Around 10:00 P. M. appellants chose to discuss the case after conferring between themselves [R. T. 184-186]. It is difficult to see how appellants' will was overborne, when they made a joint decision to talk.

Appellants contend that because the record shows that Moser refused to say anything after being advised of his constitutional rights prior to the interrogation concerning the Los Angeles robbery and that no waiver can be assumed. However, the record is equally void of any refusal of appellants to converse with the Agents of the Federal Bureau of Investigation. Appellants participated in a general discussion with the Agents [R. T. 184]. At approximately 10:30 P. M. appellants were permitted to confer

among themselves and at this time they decided to discuss the Los Angeles Bank robbery [R. T. 184-186]. It would be difficult to imagine a more explicit waiver of the constitutional right to remain silent that that given by appellants once they had conferred among themselves and decided to tell the story concerning the Los Angeles Bank robbery.

Appellants' argument that the Rule 20 discussion created a possibility of leniency and therefore, is an indication of the involuntariness of the confession is specious. The record is clear that Appellant Moser first mentioned this subject [R. T. 184, 193-196 and 217) that Agent McGovern explained it correctly and made it clear that he had no control over whether or not it would be available to appellant. The fact that appellants were aware of the existence of Rule 20 shows that they knew the possibility of the benefit of concurrent sentences. The record shows that the interrogators made it clear that there was no way of knowing what sentence would be given [R. T. 198-199].

The logical conclusion is that appellants' confessions were not triggered by promised leniency, but instead was a calculated move by appellants to try and obtain a Rule 20 transfer and a possible concurrent sentence. Appellants' only objection is that their strategy went astray and that they did not receive their concurrent sentences. The rational mind displayed by this maneuver is strong evidence that the confessions were the product of a free and rational will.

Contrary to the contentions of appellants, the record contains

an abundance of evidence showing that the confessions were voluntary. The record is clear that appellants were fully advised of their rights on at least three separate occasions, the appellants have not alleged any unusual or cruel treatment, appellants' conversations were coherent and no alcohol was detected by the interrogators, appellants both had long criminal records and were well aware of the nature of the proceedings with which they were confronted [R. T. 446-452], appellants were allowed to confer among themselves prior to making any statement concerning the Los Angeles robbery, and the trier of fact unequivocally disbelieved the story presented at the trial by appellants.

The overwhelming evidence in the case now before the Court clearly shows that the appellants made a rational decision to confess in order to attempt to gain the benefits of Rule 20. It does not show that their will was overborne in any manner, just that their plan did not work. It is respectfully submitted that the confessions be deemed voluntary.

V

CONCLUSION

For the reasons stated the judgment of the District Court should be confirmed.

Respectfully submitted,

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Attorneys for Appellee,
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Dennis E. Kinnaird

DENNIS E. KINNAIRD
Assistant U. S. Attorney

FOR THE NINTH CIRCUIT

NIEL A. ROBIDA, : NO. 20592

Petitioner, : PETITION FOR REHEARING

v. :

MMISSIONER OF INTERNAL REVENUE, :

Respondent. :

See Vol. 3374

DANIEL ROBIDA respectfully petitions for a rehearing on the

GROUNDS

That the January 20, 1967 decision of this Court does justice, t not completely. That decision indicates that the primary issue was titioner's claim of exemption under section 911 of this Internal Revenue de of 1954. The decision does not determine the effect of Respondent's andonment of the grounds stated in his deficiency notice and his answer r the effect of Respondent's access to Petitioner's records, withholding em from Petitioner; the availability of the net worth system; the appli- tion of the statute of limitations. Petitioner believes and urges that mplete justice requires these matters to be considered and determined.

1. THE PRIMARY ISSUE WAS FRAUD

a) A deficiency notice is equivalent to a summons which thetax- yer answers by a petition to the Tax Court. The Commissioner's answer in the nature of replication. See Baglivo v. CIR (D.C. Pe. 1954) 235 Supp 493, 495 and Papineau v. CIR 28 TC 54, 57.

b) The CIR's Notice (IR 43-61) based assessment on fraud.

c) Paragraphs 7(c) and (d) of CIR's Answer (IR 7-12) indicate tha lculation of deficiencies was done on the net worth ystem. (Answer hibit A). The net worth system was used in aid of the fraud charge.

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arged Petitioner with concealing assets, refusing to make records avail
le and failure to file returns, all by way of fraud. The charge of
mbling (Answer 7(b) was also part of the concealing charge and not con-
cted to any other issue.

3. WHEN CIR ABANDONED FRAUD, NO ISSUE REMAINED

a) The CIR is bound by the conduct of his counsel (CIR v. Erie rge Co. (C.C.A.3 1938) 167 F2d 71.

At the trial counsel for the Commissioner said:

"A fraud issue has been raised but Respondent is abandoning the fraud issue." (II R 2-3 line 12)

He also conceded:

"The deficiencies set up are based on a net worth estimate, your Honor, and I think you will find them attached to the Answer." (II R 12 line 6)

. Ciranni made it plain that fraud was based on failure to file:

"I have already told him we had found the returns. He can't get them into evidence, but I will get them into evidence. We have copies of them here. This was the basis of our fraud allegation." (II R 17)

b) After the CIR abandoned fraud MR. ROBIDA said:

"I don't know how to proceed." (II R 16 line 1); and "I would like to request the Respondent to make it more clear to me what is the basis for them having served a Jeopardy Assessment on me in the first place." (II R 16 line 2-4)

Commenting on the Notice, and Answer, ROBIDA said:

"The inconsistencies are very hard on me to

c) No Issue Remained. In Leon Papineau v. CIR (1967) 28 TC 54, 5
e CIR in an Answer relied on different grounds than the deficiency notic
was held to have abandoned his original determination.

In the instant case the Answer contained no new material. Therefore wh
e CIR abandoned the ground theretofore relied on there was no issue befo
e Court and no burden of proof on either party.

In Moise v. Burnette (CCA 9th) 52 F2d 1071, 1072 the CIR at time of tri
tempted to rely on grounds not noticed and not pleaded. The Court held
at proper construction of the statutes

> "....required that a claim should actually and definitely be made and not left to conjecture, inference or interpretation.", and that the CIR "....must be bound by his pleadings and cannot be assumed to have intended to present a claim that he did not actually make." 52 F2d 1071, 1072.

In Moise, the Court noting that the statute limitations had run, said

> "....neither the Commissioner nor the Board had the power to determine any deficiency whatever."

In Tex-Penn Oil Co. v. CIR (CCA 3 83 F2d 518, 524 the CIR was held to h
andoned notices where he changed grounds. The Court ordered judgment of
deficiency.

In ROBIDA the Tax Court and the CIR inferred that issues remained after
R repudiated the grounds of his Notice and Answer (II R 14). In fact no
sue did remain.

U.S. v. Heath (CCA 9th 1958) 260 F2d 623, 632 held that where the Gover
nt withheld taxpayer's records it forfeited right to proceed further in
criminal fraud trial. Hinchcliffe v. Clarke (1963) 230 F. Supp 91, 64-2
TC 93 and Lord v. Kelly (1964) 334 F2d 742, Cert. denied 85 S. Ct. 650,
S. 961, 13 L Ed rd 556 apply the same principle to civil tax cases.

ER TITLE 26 USC § 7602 AND UNDER THE FOURTH AMENDMENT TO THE CONSTITUTI

a) The record shows that Respondent obtained Petitioner's records or to trial without consent or process and denied Petitoner access. itioner continuously sought their return.

Respondent at oral argument before thia Court said that the CIR or his nsel now have only some of the records and that they will make the ori- als of those only available at further trial.

The party having access to part of the records is deemed to have them a U.S. v. Consolidated Laundries Corp. 291 F2d 763, 571.

b) Title 26 USC §7602 requires CIR to obtain records by process. Fourth Amendment to the Constitution protects citizens from improper zure. In Hinchcliffe v. Clarke (1963) 230 F Supp 91, 64-2 USTC 93, 259 CIR obtained taxpayer's records without following 26 USC § 7605. Court prohibited their use in any way whatsoever.

6. THE CIR'S CASE DEPENDED UPON NET WORTH: IT IS NOT AVAILABLE

The deficiency notice advises

> "In the absence of adequate records, your taxable income has been computed upon...net worth..." (I R 44)

Since the basis of the 'absence" was "no return filed" (I R 45, 48, 51, 57, 60) the CIR has no right to proceed on the net worth system after itting filing and failing to produce records.

7. ALL YEARS ARE NOW BARRED

Section 6212 (c)(1) of the Internal Revenue Code of 1954 prov t the Commissioner cannot determine additional deficiencies after the t er files a petition with the Tax Court.

A second notice is invalid if sent after the period of assess t. Rudd Mfg. Co. 15 TC 374. The statute has now run.

new notice will be valid.

WHEREFORE Petitioner respectfully urges that this Court now dify its decision either to direct judgment for Petitioner or to make h findings and directions as will give to Petitioner proper protection to the matters herein set forth. It would now be unjust to require titioner to go to the expense of a new trial.

Attorney for Daniel Robida

Affidavit of Service by Mail

JOHN R. SWENDSEN, being first duly sworn, deposes and says:

I am a citizen of the United States, over the age of 21 and not a rty to the within proceeding.

On February 17, 1967, I served the foregoing Petition for Rehearin the Honorable Mitchell Rogovin, Assistant Attorney General, by depositi copy thereof, airmail postage prepaid, in the United States Mail, addres him as follows:

Honorable Mitchell Rogovin
Assistant Attorney General
U.S. Department of Justice
Washington, D.C. 20530

SUBSCRIBED and sworn to before me at San Francisco, California, this 17 of February, 1967, by JOHN R. SWENDSEN.

Notary Public

My Commission expires:
March 24, 1968.

Certificate of Counsel

I certify that in my judgment this Petition is well founded and not terposed for delay.

Attorney for Petitioner